

HOUSE No. 2688

The Commonwealth of Massachusetts

PRESENTED BY:

John J. Binienda

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to the taxation of cigarettes and other tobacco products.

PETITION OF:

NAME:

Cheryl A. Coakley-Rivera

DISTRICT/ADDRESS:

10th Hampden

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 4033 OF 2007-2008.]

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO THE TAXATION OF CIGARETTES AND OTHER TOBACCO PRODUCTS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority
of the same, as follows:*

1 The General Laws are hereby amended by adding after Chapter 64C the following chapter:—

2 Chapter 64C½ - Tobacco Products Excise

3 Section 1. Whenever used in this chapter, unless the context shall otherwise require, the following words or
4 terms shall have the following meanings:

5 “Business”, any trade, occupation, activity or enterprise engaged in for the purpose of selling or distributing
6 cigarettes or tobacco products in the commonwealth.

7 “Distributor”, any person engaged in the business of producing or manufacturing cigarettes or tobacco products
8 in the commonwealth for sale in the commonwealth, any person engaged in the business of selling cigarettes or
9 tobacco products in the commonwealth who brings, or causes to be brought, into the commonwealth any
10 cigarettes or tobacco products for sale to a retailer, or any person engaged in the business of selling cigarettes or
11 tobacco products who ships or transports tobacco products to retailers for sale in the commonwealth or any
12 retailer who imports, receives or acquires, from a person other than a licensed distributor, cigarettes or tobacco
13 products for sale within the commonwealth.

14 “Licensed”, licensed as a manufacturer, wholesaler, vending machine operator, unclassified acquirer,
15 transportation company or retailer pursuant to section 67 of chapter 62C.

16 “Licensee”, a person licensed as a manufacturer, wholesaler, vending machine operator, unclassified acquirer,
17 transportation company or retailer pursuant to section 67 of chapter 62C. Whenever used in this chapter, unless
18 the context shall otherwise require, the words "sales" or "sale" in addition to their ordinary meaning shall
19 include or apply to use, gifts, exchanges and barter.

20 “Manufacturer”, (a) any entity which manufactures or otherwise produces cigarettes or causes cigarettes to be
21 manufactured or produced anywhere that such manufacturer intends to be sold in the commonwealth, including

cigarettes intended to be sold in the United States through an importer; (b) the first purchaser anywhere that intends to resell in the United States cigarettes manufactured anywhere that the original manufacturer or maker does not intend to be sold in the United States; or (c) any entity that becomes a successor of an entity described in clause (a) or clause (b) of this definition.

“Person”, any individual, firm, fiduciary, partnership, corporation, trust or association, however formed, club, trustee, agency or receiver.

“Place of business”, any place where tobacco products are sold or where tobacco products are brought or kept for the purpose of sale or consumption, including so far as applicable any vessel, vehicle, airplane, train or cigarette vending machine.

“Retailer”, any entity, other than a transportation company but including a manufacturer or wholesaler, who operates a store or concession for the purpose of making sales of tobacco products at retail, and any person selling tobacco products through vending machines.

“Retail outlet”, a place of business from which tobacco products are sold to consumers. Vending machines shall be considered a retail outlet.

“Sale”, in addition to its ordinary meaning, any transfer of title or possession or both, use, gift, exchange, or barter in any manner or by any means whatsoever, for a consideration. “Sale” includes the giving of cigarettes or other tobacco products as samples, prizes, or gifts for advertising by a person engaged in the business of selling tobacco products.

“Smokeless tobacco”, snuff, snuff flour and any other tobacco or tobacco product prepared in such manner as to be suitable for chewing, including, but not limited to cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco.

“Stamper”, any person authorized by the commissioner to purchase and affix adhesive or meter stamps under this chapter.

“Tobacco products”, cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco. “Tobacco products” also includes smokeless tobacco, as well as other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking.

“Transportation company”, any person operating, or supplying to a common carrier, cars, boats or other vehicles for the transportation or accommodation of passengers and engaged in the sale of tobacco products at retail.

“Unclassified acquirer”, any person, other than a transportation company or other than a purchaser at retail from a licensed retailer, who imports or acquires tobacco products from any one other than a licensed manufacturer, a licensed wholesaler or a licensed vending machine operator.

“Vending machine operator”, any person other than a manufacturer or a wholesaler who operates one or more vending machines for the sale of tobacco products at retail and who purchases his tobacco products from a manufacturer or licensed wholesaler.

“Wholesaler”, any person who purchases directly from the manufacturer at least 75 per cent of all tobacco products purchased by him and who sells at least 75 per cent of all tobacco products purchased by him to others for resale, and any other person who purchases from a manufacturer or person so purchasing and selling and licensed as a wholesaler, provided such other person maintains an established place of business where substantially all of the business is the sale of tobacco products and related merchandise at wholesale to licensees

and where at all times a substantial stock of tobacco products and related merchandise is available to all retailers for resale; and any chain of stores retailing tobacco products to the consumer, provided 75 per cent of its purchases are made direct from the manufacturer.

"Wholesale sales price", the price for which a manufacturer sells tobacco products to a distributor, exclusive of any discount or other reduction.

Section 2. (a) Every distributor shall obtain a license from the commissioner of Revenue before engaging in business. A retailer required to be licensed as a distributor pursuant to this chapter must also hold a current retail tobacco license issued under section 67 of chapter 62C.

(b) Every license application must be made on a form prescribed by the commissioner and must state the name and address of the applicant, the address of the applicant's principal place of business and such other information as the assessor may require for the proper administration of this chapter. A person outside the commonwealth who ships or transports tobacco products to a retailer in the commonwealth must make application as a distributor and be granted by the commissioner a license subject to all the provisions of this chapter and agree, upon applying for a license, to submit that person's books, accounts and records to examination by the bureau during reasonable business hours and to accept service of process by mail when service is made in any proceeding involving enforcement of this chapter.

(c) A license issued pursuant to this section expires on June 30th of each year, unless sooner revoked by the commissioner. The license must be prominently displayed on the premises covered by the license and may not be transferred to any other person.

(d) The following penalties apply to a violation of this section:

i. A distributor that imports into the commonwealth any tobacco product without holding a distributor's license issued by the commissioner pursuant to this section commits a civil violation for which a fine of not less than \$250 and not more than \$500 must be adjudged.

ii. A distributor that violates section (d)(i) of this section after having been previously adjudicated as violating section (d)(i) commits a civil violation for which a fine of not less than \$500 and not more than \$1,000 must be adjudged for each subsequent violation.

iii. A distributor that sells at wholesale or retail, offers for sale at wholesale or retail or possesses with intent to sell at wholesale or retail any tobacco product without holding a distributor's license issued by the commissioner pursuant to this section commits a civil violation for which a fine of not less than \$250 and not more than \$500 must be adjudged.

iv. A distributor that violates section (d)(iii) after having been previously adjudicated as violating section (d)(iii) commits a civil violation for which a fine of not less than \$500 and not more than \$1,000 must be adjudged for each subsequent violation.

(b) The commissioner may revoke or suspend the license of any distributor for failure to comply with any provision of this chapter or if the person no longer imports or sells tobacco products. A person aggrieved by a revocation or suspension may petition the commissioner for a hearing as provided in section 68 of chapter 62C.

(c) The commissioner shall maintain a directory of distributors licensed pursuant to this chapter. The commissioner shall update the directory as necessary, but not less than annually. Notwithstanding the provisions of section 47A of chapter 62C, the list must be available to the public and must be posted on a publicly accessible website maintained by the commissioner. The directory must be mailed annually to all retailers at or near the time of renewal of a retail tobacco license issued under section 67 of chapter 62C.

- (d) A licensed distributor that does not renew or maintain a license, or that has its license suspended or revoked, shall inform in writing all its accounts in the commonwealth that it no longer holds a valid license under this section. The licensed distributor shall inform its accounts in the commonwealth within 10 business days of the event giving rise to such notice. Notwithstanding the provisions of section 47A of chapter 62C, the commissioner may publish the names of distributors that have not renewed or maintained a license or that have had a license suspended or revoked.

Section 3. (a) An excise is imposed on all smokeless tobacco, including chewing tobacco and snuff, at the rate of 90 per cent of the wholesale sales price. Of the revenues received pursuant to this section, together with any penalties, forfeitures, interest, cost of suits and fines collected in connection therewith, less all amounts refunded or abated in connection therewith, 27.77 per cent shall be credited to the Children's and Seniors' Health Care Assistance Fund, established pursuant to section 2FF of chapter 29. An additional 27.77 per cent of the revenues received pursuant to this section shall be credited to the Health Protection Fund, established pursuant to section 2GG of chapter 29. The balance remaining after crediting the amount required under this subsection (a) shall be credited to the General Fund.

- (b) An excise is imposed on cigars, pipe tobacco and other tobacco intended for smoking at the rate of 30 per cent of the wholesale sales price. Of the revenues received pursuant to this section, together with any penalties, forfeitures, interest, cost of suits and fines collected in connection therewith, less all amounts refunded or abated in connection therewith, 50 per cent shall be credited to the Children's and Seniors' Health Care Assistance Fund, established pursuant to section 2FF of chapter 29. The balance remaining after crediting the amount required under this subsection (b) shall be credited to the General Fund.

- (c) The excise is imposed at the time the distributor brings or causes to be brought into the commonwealth tobacco products that are for sale to consumers or to retailers or for use or at the time tobacco products are manufactured or fabricated in the commonwealth for sale in the commonwealth.

- (d) The excise imposed on tobacco products does not apply to those products exported from the commonwealth or to any tobacco products which under laws of the United States may not be subject to taxation by the commonwealth.

Section 4. Every distributor subject to the licensing requirement of section 2 of this chapter 64C½ shall on or before the last day of each month submit, on a form prescribed and furnished by the commissioner of Revenue, a report together with payment of the excise due under this chapter stating the quantity and the wholesale sales price of all tobacco products held, purchased, manufactured, brought in or caused to be brought in from outside the commonwealth or shipped or transported to retailers with the commonwealth during the preceding calendar month. Every such distributor shall keep a complete and accurate record at its principal place of business to substantiate all receipts of tobacco products.

Such monthly reports must contain such further information as the commissioner of Revenue may prescribe and must show a credit for any tobacco products exempted as provided in section 3 of this chapter 64C½. Records must be maintained to substantiate the exemption. Tobacco products previously taxed that are returned to a manufacturer because the product has become unfit for use, sale or consumption may be taken as a credit on a subsequent return upon receipt of the credit notice from the original supplier.

A person who is not a distributor licensed pursuant to this chapter who imports, receives or otherwise acquires tobacco products for use or consumption in the commonwealth from a person other than a licensed distributor shall file, on or before the last day of the month following each month in which tobacco products were acquired, a return on a form prescribed by the commissioner together with payment of the excise imposed by this chapter at the rate provided in section 3 of this chapter 64C½. The return must report the quantity of tobacco products imported, received or otherwise acquired from a person other than a licensed distributor or retailer during the previous calendar month and additional information the assessor may require.

Section 5. (a) Except as provided in subsections (b) and (c) of this section, only a person licensed pursuant to section 2 of this chapter 64C½ may import tobacco products into the commonwealth.

(b) A manufacturer may transport tobacco products into the Commonwealth and may transport tobacco products from place to place within the Commonwealth in quantities greater than those excepted in section (c) of this section for the purpose of marketing and sales if the sale or distribution of those tobacco products is accounted for and the excises are paid by a person licensed pursuant to section 2 of this chapter 64C½.

(c) A person who is not a licensed distributor may transport tobacco products into the Commonwealth and may transport tobacco products from place to place within the Commonwealth for personal use in a quantity not greater than 50 cigars or 1 pound of other tobacco product.

(d) The possession by a person who is not licensed pursuant to section 2 of this chapter 64C½ of more than 50 cigars or 1 pound of other tobacco product for which the excise imposed by this chapter has not been paid is prima facie evidence of a violation of this section.

(e) A person who violates this section commits a misdemeanor. Violation of this section by a person other than a retailer is a strict liability crime. It is an affirmative defense to a prosecution under this section that a retailer, alleged to have imported tobacco products or caused tobacco products to be imported, reasonably relied on licensing information annually mailed to the retailer pursuant to subsection (f) of section 2 of this chapter 64C½ that listed the company from which the retailer obtained tobacco products as being a licensed distributor.

Section 6. (a) A distributor may not offer for sale or sell tobacco products if the package containing the tobacco products:

i. Is subject to and does not comply with 15 U.S.C. Section 4401, et seq., for the placement of labels, warnings or any other information for a package of tobacco products to be sold within the United States and 26 U.S.C. Section 5723;

ii. Is labeled "For Export Only," "U.S. Tax Exempt," "For Use Outside U.S." or with other wording indicating that the manufacturer did not intend that the product be sold in the United States;

iii. Has been altered by adding or deleting wording, labels or warnings described in paragraphs (i.) and (ii.) of this section

iv. Has been imported into the United States in violation of 26 U.S.C. Section 5754; or

v. In any way violates federal trademark or copyright laws.

(b) A distributor may not sell or offer to sell tobacco products to a retailer unless the retailer has provided documentation to the distributor that the retailer holds a current retail tobacco license issued under section 67 of chapter 62C.

(c) A distributor that sells tobacco products described in subsection (a), with or without having paid the appropriate excise, commits an unfair or deceptive act or practice under chapter 93A, the Massachusetts Regulation of Business Practice and Consumer Protection Act.

(d) A distributor that violates this section commits a misdemeanor. Violations of this section constitute a strict liability crime.

Section 7. (a) Except as provided in subsection (b), any tobacco products for which the excise imposed by this chapter has not been paid or tobacco products described in subsection (a) of section 6 of this chapter 64C½ that are found in the Commonwealth are contraband goods subject to seizure by and forfeiture to the Commonwealth. A law enforcement officer or a duly authorized agent of the Commissioner pursuant to section 26 of chapter 64C may seize contraband tobacco products under the process described in subsection (c).

(b) The following tobacco products are not subject to seizure:

- i. Tobacco products in the possession of a licensed distributor or manufacturer for which the excise imposed by this chapter has not been paid;
- ii. Tobacco products for which the excise imposed by this chapter has not been paid that are in the course of transit from without the Commonwealth and:
 - A. consigned to a licensed distributor; or
 - B. in transit by common carrier or contract carrier.
- i. Tobacco products in a quantity of no more than 50 cigars or 1 pound of other tobacco product in the possession of an individual who is not a licensed distributor for which the excise imposed by this chapter has not been paid.

Notwithstanding paragraphs (i.), (ii.) and (iii.), tobacco products described in subsection (a) of section 6 of this chapter 64C½ are subject to seizure under the process described in subsection (c) of this section, unless the distributor can prove the tobacco products are to be exported out of the country.

(b) Contraband tobacco products may be seized by a law enforcement officer or a duly authorized agent of the Commissioner pursuant to section 26 of chapter 64C who has probable cause to believe that the tobacco products are untaxed or are tobacco products described in subsection (a) of section 6 of this chapter 64C½ under the following circumstances:

- i. When the tobacco products are discovered in a place where the law enforcement officer or agent has the lawful right to be in the performance of official duties; or
- ii. When the seizure is incident to a search under a valid search warrant or an inspection under a valid administrative inspection warrant.

(b) A petition for forfeiture must be filed as provided in this subsection.

- i. A district attorney or an assistant district attorney, or the Attorney General or an assistant attorney general, may petition the District Court in the name of the Commonwealth in the nature of a proceeding in rem to order the forfeiture of contraband tobacco products.
- ii. There may be no discovery other than under the Massachusetts Rules of Civil Procedure, Rule 36 except by order of the court upon a showing of substantial need. An order permitting discovery must set forth in detail the areas in which substantial need has been shown and the extent to which discovery may take place.
- iii. A petition for forfeiture filed pursuant to this section must be accepted by the District Court without the assessment or payment of civil entry or filing fees otherwise provided for by rule of court.

(b) Tobacco products subject to forfeiture under this section must be declared forfeited by the District Court having jurisdiction over the tobacco products. Venue is in the location where the contraband tobacco products are seized or in Suffolk County.

(c) A proceeding instituted pursuant to this section is an in rem civil action. The Commonwealth has the burden of proving all material facts by a preponderance of the evidence. The owner of the tobacco products or other person claiming the tobacco products has the burden of proving by a preponderance of the evidence 1 of the exceptions set forth in subsection (b) of this Section 7.

(d) At a hearing other than a default proceeding, the court shall hear evidence, make findings of fact, enter conclusions of law and file a final order to which the parties have the right of appeal. When tobacco products are ordered forfeited, the final order must provide for the disposition of the tobacco products by the Commissioner by public auction or by the State Purchasing Agent. Proceeds must be deposited in the General Fund. Tobacco products described in subsection (a) of section 6 must be destroyed by the Commissioner in a manner that prevents their reintroduction into the marketplace.

(e) Default proceedings must be held in the same manner as default proceedings in other civil actions, except that service of motions and affidavits related to the default proceedings need not be served upon any person who has not answered or otherwise defended in the action under this section.

SECTION 2. Section 5A of chapter 64C, as appearing in the 2004 Official Edition, is hereby amended by striking out in line 3 the words "and tobacco products".

SECTION 3. Section 6 of said chapter 64C, as so appearing, is hereby amended by striking out the second and last paragraphs, inclusive.

SECTION 4. Subsection (a) of section 7A of said chapter 64C, as so appearing, is hereby amended by striking out the last sentence.

SECTION 5. Section 7B of said chapter 64C, as so appearing, is hereby repealed.

SECTION 6. Subsection (a) of section 7C of said chapter 64C, as so appearing, is hereby amended by striking out the last sentence.

SECTION 7. Subsection (a) of section 14 of said chapter 64C, as so appearing, is hereby amended by striking out the last sentence and inserting in place thereof the following: —

Any such wholesaler violating this subsection shall be punished by:

(1) a fine of not more than \$10,000 for a first offense and a 7-day suspension of their license to distribute.

(2) a fine of not more than \$25,000 and a 14-day suspension of their license to distribute for a second offense.

(3) a fine of not more than \$50,000 and revocation of their license to distribute for each subsequent offense.